No. 87-157

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

FREDRIC W. YERMAN
(Counsel of Record)
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorney for Respondent

Of Counsel:

Michael Malina
Randolph S. Sherman
Richard A. De Sevo
Bert L. Slonim
Donna M. Gerber
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Motivated at least in part by a desire to maintain their control over a concentrated market, petitioner and other manufacturers of steel conduit conspired to exclude respondent's competing product from the National Electrical Code by stacking the trade association meeting that adopted the Code with "bodies" who were "instructed" "how to vote" and ordered to remain "glued to [their] seats" until the agreed-upon exclusion was accomplished. While the Code was subsequently adopted, in whole or in part, by a number of state and local governmental bodies, the exclusion of respondent's product from the Code also had a direct marketplace impact separate and apart from the impact of such governmental action. In addition, petitioner marketed the stigma of the product's exclusion from the Code throughout the marketplace, causing further anticompetitive impact. The jury, under admittedly proper Rule-of-Reason instructions, found that the conspiracy, by "subvert[ing] the consensus standard making process" of the private trade association, and thus eliminating the procompetitive benefit that ordinarily justifies voluntary nongovernmental standard making, produced an unreasonable restraint of trade injuring respondent. The questions presented are:

1. Does the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which exempts from the application of the Sherman Act "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws," immunize petitioner's conspiracy from antitrust scrutiny merely because the Code was eventually adopted, in whole or in part, by some organs of state or local government?

2. If petitioner's conspiracy was not immunized from antitrust scrutiny by the *Noerr* doctrine, was there evidence to support the jury's determination that the conspiracy in question unreasonably restrained trade in violation of Section 1 of the Sherman Act?

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
A. The Facts	1
1. The Parties and Their Products	1
2. NFPA, Consensus Standard Making and the National Electrical Code	2
3. The Admitted Conspiracy to Exclude ENMT from the Market	4
a. The Conspiracy's Formation	5
b. The May 1980 Meeting—The Conspiracy Succeeds	7
4. The Sanders Committee Report	9
5. The Conspiracy's Market Effect	10
B. The Proceedings Below	12
1. The Trial	12
2. The District Court's Oral Decision	14
3. The Court of Appeals' Decision	15
SUMMARY OF ARGUMENT	17
ARGUMENT	20
I. THE *NOERR* DOCTRINE DOES NOT IMMUNIZE ALLIED'S ANTICOMPETITIVE CONSPIRACY FROM ANTITRUST SCRUTINY	20
A. Allied's Vote-Stacking Conspiracy Was Not Mere Solicitation of Governmental Action	21
1. The *Noerr* Doctrine	21

PAGE

2. The Conspiracy Was a Traditional Restraint of Trade 23

3. The Conspiracy Did Not Constitute Petitioning of Government 25

a. NFPA Is Not an Organ of Government .. 26

b. Allied's Conduct Was Not Lobbying 27

c. The Conspiracy Caused Independent Marketplace Injury 29

B. Imposing Antitrust Liability for Allied's Concerted Subversion of the Consensus Standard Making Process Is Necessary to Preserve the Process's Social Utility and Will Not Stifle Uninhibited Debate 33

C. If Otherwise within the *Noerr* Doctrine, Allied's Conduct Falls Squarely within the Sham Exception 37

II. THERE BEING NO *NOERR* IMMUNITY, THE JURY'S FINDING THAT ALLIED'S VOTE-STACKING CONSPIRACY UNREASONABLY RESTRAINED TRADE IS AMPLY SUPPORTED BY THE EVIDENCE 39

CONCLUSION 42

TABLE OF AUTHORITIES

Cases: PAGE

American Society of Mechanical Engineers, Inc. v. *Hydrolevel Corp.*, 456 U.S. 556 (1982) 20, 24, 29, 36

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 41n.59

Associated Press v. *United States*, 326 U.S. 1 (1945) 23, 41n.59

Bond Crown & Cork Co. v. *FTC*, 176 F.2d 974 (4th Cir. 1949).....25 n.35

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 23 n.34, 35, 37-38

Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918) 24, 39

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).....22 n.33

City of Los Angeles v. *Preferred Communications, Inc.*, 476 U.S. 488, 106 S. Ct. 2034 (1986).....35 n.48

Columbia Broadcasting System, Inc. v. *American Society of Composers, Authors and Publishers*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981) . 40

Consolidated Farmers Mutual Ins. Co. v. *Anchor Savings Association*, 1980-2 Trade Cas. (CCH) ¶ 63,530 (10th Cir. 1980), *aff'g* 480 F. Supp. 640 (D. Kan. 1979).....24 n.35

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 40

PAGE

C-O-Two Fire Equipment Co. v. *United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952) 25 n.35

E.A. McQuade Tours, Inc. v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).....24 n.35

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).....*passim*

ECOS Electronics Corp. v. *Underwriters Laboratories*, 743 F.2d 498 (7th Cir. 1984), *cert. denied*, 469 U.S. 1219 (1985).....24 n.35

Fash. n Originators' Guild of America, Inc. v. *FTC*, 312 U. S. 457 (1941)..... 23

Feminist Women's Health Center, Inc. v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).....27 n.38

Fort Howard Paper Co. v. *FTC*, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946).....25 n.35

FTC v. *Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009 (1986)..... 37

Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949)..... 35

Gunter Harz Sports, Inc. v. *United States Tennis Association*, 665 F.2d 222 (8th Cir. 1981).....24 n.35

Hoover v. *Ronwin*, 466 U.S. 558 (1984).....31-32

Israel v. *Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972)..... 37

Litton Systems, Inc. v. *American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984)..... 37

PAGE

Milk & Ice Cream Can Institute v. *FTC*, 152 F.2d 478 (7th Cir. 1946).....25 n.35

National Macaroni Mfrs. Ass'n v. *FTC*, 345 F.2d 421 (7th Cir. 1965).....25 n.35

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978).....40, 41 nn.58 & 59

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).....41

Parker v. *Brown*, 317 U.S. 341 (1943).....18, 31-32

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).....24 n.35

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984).....35

Roofire Alarm Co. v. *Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd without opinion*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).....24 n.35

Sessions Tank Liners, Inc. v. *Joor Mfg., Inc.*, 827 F.2d 458 (9th Cir. 1987).....19, 33 n.45,.38

Standard Sanitary Mfg. Co. v. *United States*, 226 U.S. 20 (1912).....25 n.35, 41n.59

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888).....34 n.46

Structural Laminates, Inc. v. *Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).....24 n.35

Town of Hallie v. *City of Eau Claire*, 471 U.S. 34 (1985) 26

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965).....23 n.34

PAGE

United States v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 25 n.35

United States v. *Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966) 27 n.38

United States v. *National Malleable & Steel Castings Co.*, 1957 Trade Cas. (CCH) ¶ 68,890 (N.D. Ohio 1957), *aff'd*, 358 U.S. 38 (1958) 25 n.35

United States v. *Topco Associates*, 405 U.S. 596 (1972) 20 n.31

United States Constitution:

First Amendment ..... *passim*

Statutes, Rules and Regulations:

Internal Revenue Code:

Section 170, 26 U.S.C. § 170 ..... 3 n.6
Section 501, 26 U.S.C. § 501 ..... 3 n.6

Sherman Act:

Section 1, 15 U.S.C. § 1 ..... *passim*

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parents of respondent (whose name was changed to TBG, Inc. after the filing of the complaint) are TBG North America Limited, TBG Holdings, N.V., Favorita Holding Company Limited, Tamara Corporation, and Thyssen-Bornemisza Continuity Trust. Respondent has no non-wholly-owned subsidiaries. Respondent's domestic affiliates are TBG North America Ltd., Agriquip Midwest, Inc., CCL Leasing Corp., Cap Inc., CLSI, Inc., C L Systems, Inc., Computer Library Services International Ltd., Continental Healthcare Systems, Inc., Ball-InCon Glass Packaging Corp., Greenland (Delaware) Inc., Information Handling Services, Inc., TBG Information Systems, Inc., Innotec Group Inc., International Berkefeld-Celle Filter Corp. of USA, Madera Glass Company, Moba USA Inc., Multi-Amp Corporation, Multi Amp Services Corporation, Mokveld Valves Inc., Predicasts International, Inc., Staalkat U.S.A. Inc., TBG Information Co. Inc., Vulcan Petroleum Inc., Vicon Credit Corporation, Vicon Farm Machinery, Inc., and Vicon Southeast, Inc. All of respondent's foreign affiliates are privately held companies.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

A. The Facts

Petitioner's brief ("Pet. Br.") incorporates the basic facts as stated in the opinion of the court of appeals. The Second Circuit's opinion, however, does not recite all of the pertinent facts material to consideration of the case. We accordingly set forth a more complete statement of facts below.

1. The Parties and Their Products

Petitioner and respondent manufacture products which compete head-on in the marketplace. Carlon, a division of respondent Indian Head, Inc.,[1] manufactures and sells various types

---

1 After the complaint was filed, Indian Head's name was changed to TBG, Inc. For convenience, we refer to the respondent as Carlon.

of electrical conduit and fittings made of polyvinyl chloride.[2] Petitioner Allied Tube and Conduit Corporation ("Allied") is the largest producer of electrical metallic tubing ("EMT")—*i.e.*, steel conduit—in the United States. (Tr. 772).

Electrical conduit is a hollow tube that carries insulated wires which transmit electrical current. (Tr. 95-96). Carlon's product—electrical nonmetallic tubing ("ENMT")—has a number of significant competitive advantages over steel conduit due to its pliability, its lower installed cost and its lower susceptibility to short circuiting.[3] Allied and other EMT producers accordingly considered ENMT a "severe competitive threat." (Tr. 1063).

In 1980, when Carlon began offering ENMT as a substitute for EMT, it confronted a stable market dominated by five steel conduit producers, the largest of which was Allied, with a market share of 35% to 40%.[4] During the period in which ENMT was excluded from the market, these EMT manufacturers continued to enjoy close to 100% of all electrical conduit sales. (Tr. 773-74).

2. NFPA, Consensus Standard Making and the National Electrical Code

The National Fire Protection Association ("NFPA") is a "private, non-governmental . . . voluntary membership organization"[5] barred by law from attempting to influence legislation.[6] One of its principal activities is the promulgation, through a process called "consensus standard making," of product standards and codes related to fire protection. (Tr. 85, 184, 1005-06). As the term implies, through consensus standard making, NFPA's members—comprising varying interests including industry, insurance, medicine, fire fighters and government officials—attempt to reach a consensus, objectively arrived at on the merits, with respect to standards that are then offered to the public. (Tr. 305, 314, 1005). Although NFPA encourages new membership "so that it can represent as broad a spectrum as possible," no single interest is supposed to become so large that it "can predominate and make the standard the creature of that interest." (Tr. 184, 303-06, 352-55, 1032). While there are no prerequisites for voting at the annual meetings at which the standards are adopted (other than NFPA membership for a minimum time period, 30 days as of 1980), there is an "inherent assumption" that the members voting at the meeting "know what they are doing" based on the full disclosure of all relevant information. (Tr. 307, 947-48, 1571; JX-1 ¶ 24).

The NFPA code at issue here is the National Electrical Code ("NEC"), which promulgates standards for electrical systems, including electrical conduit. (Tr. 85-86; JX-1 ¶¶ 18-19). NFPA publishes the NEC every third year following a multistep, several-year-long process, ending with a debate and vote by the full membership at the annual meeting.[7] In 1980, a simple majority vote of those members present at the meeting was sufficient to approve or defeat a proposal. (PX-330 p. 5).

---

2 JX-1 ¶ 3; Tr. 97, 104, 106. Citations to the record are as follows: "Tr." refers to pages of the trial transcript; "App." refers to the appendix to the petition for certiorari; "J.A." refers to the Joint Appendix in this Court; "PX," "DX" and "JX" refer, respectively, to plaintiff's, defendant's and joint trial exhibits. References to pages of the transcripts of deposition testimony given to the jury are set forth as "[name of witness] Tr."

3 Tr. 107-109, 118-24; Beile Tr. 20-21; JX-1 ¶¶ 7-8; PX-553.

4 Tr. 124-25, 772-73; JX ¶¶ 11-12; PX-69 p. 1; PX-70 p. 15.

5 JX-1 ¶ 15.

6 NFPA is registered as a tax-exempt corporation under Section 170(c) of the Internal Revenue Code. 26 U.S.C. § 170(c). As such, the distribution of "propaganda, or otherwise attempting, to influence legislation" may form "no substantial part of [its] activities." 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3).

7 Tr. 133-37, 143; JX-1 ¶ 22-23; PX-330 pp. 5, 36-41; PX 554.

Following NFPA adoption, the NEC forms the basis for private decisions that directly affect market competition.[8] In addition, the Code is adopted, in whole, in part or with amendments or modifications, by many governmental entities, including state legislatures and administrative boards and county, city and other local governmental bodies.[9] Because of the NEC's reputation as the product of consensus standard making and the large number of governmental bodies involved, inclusion in the NEC is a practical prerequisite to any product's inclusion in governmental codes.[10]

Adoption by organs of government, however, is neither universal, automatic nor routine.[11] A number of jurisdictions have no electrical code. And in those states which do adopt the NEC in one form or another, there is significant lobbying at the legislative level. Indeed, approximately one-half of the states that adopt electrical codes do not adopt the NEC verbatim.[12] As Allied conceded in the district court, the NEC "does not itself have the force of law" and "is not itself legally operative." (JX-1 ¶¶ 26-27).

3. The Admitted Conspiracy to Exclude ENMT from the Market

While Allied's answer denied the conspiracy alleged in the complaint (J.A. 17), the evidence was so overwhelming that just before the case was submitted to the jury, Allied admitted it—*i.e.*, that it had conspired with, *inter alia*, Republic Steel Corporation, Wheatland Tube Company, other steel conduit manufacturers and Allied's independent sales agents to exclude

8 *See* pp. 10-12, *infra*.

9 Tr. 85-86, 286, 516-17; JX-1 ¶¶ 27-28; *see generally* Post Trial Affidavit of John Lison; Post Trial Supplemental Affidavit of John Lison.

10 *See, e.g.*, Post Trial Supplemental Affidavit of John Lison ¶ 1; Tr. 286; JX-1 ¶ 29.

11 *See* Post Trial Affidavit of Ira Sacks; Supplemental Response of Allied to Plaintiff's Fourth Set of Interrogatories.

12 Post Trial Affidavit of Ira Sacks ¶¶ 3-6.

Carlon's product from the 1981 NEC by stacking the May 1980 NFPA meeting with new Association members whose only function was to vote against the new product. (Tr. 1984; *see* J.A. 8-11). Allied also conceded that it "had a pecuniary or commercial interest in seeing to it that the product was not approved." (Tr. 2187-88). The evidence that compelled these concessions was as follows:

a. The Conspiracy's Formation

On September 18, 1978, Carlon submitted to NFPA a proposal (denominated "Article 331") to include ENMT in the NEC. (JX-1 ¶ 48; Tr. 152-59; PX-214). Following approval on the safety merits by the appropriate technical committees,[13] Article 331 was submitted to the NFPA membership for consideration at the annual meeting to be held in May 1980 in Boston. (PX-552 pp. 81-82).

When Allied and the other EMT producers became aware of Article 331, they immediately recognized, as one conspirator later wrote, that it was the "first major battleground for the attack on steel markets by segments of the plastic industry during the 80's." (PX-50 p. 1). Fully cognizant of the "severe competitive threat" posed by the new product (Tr. 1063), the conspirators agreed to exclude it from the market by rigging the vote on Article 331 at the May 1980 meeting.[14] After committee approval of Article 331 had been obtained, an "urgen[t]" meeting of the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association

13 The approval of Article 331 on the merits followed a thorough investigation, including a factfinding report by Underwriters Laboratories, field demonstrations for the committee membership and review of committee comments. (Tr. 167-69, 556-57, 581-626, 731; JX-1 ¶¶ 48-59; PX-214, PX-419, PX-420, PX-453, PX-456).

14 Tr. 751, 1062-63, 1637, 1671; Chehi Tr. 17-19; JX-1 ¶¶ 64, 65, 69-75. After a study "in detail" of the adverse effect that Article 331's adoption would have on Allied's sales, Allied's Board of Directors was told that the company would lose 40% of its EMT volume by 1984—a loss which in that year alone would amount to $20 million. (Tr. 755-62, 765-67; PX-69 p. 4).

was held to discuss the matter.[15] At that meeting (and another held shortly thereafter), representatives of Allied and its coconspirators agreed that each Steel Section member company would "be asked to provide for the attendance of as many NFPA voting members as possible" at the upcoming meeting, noting that under NFPA's then-current rules persons only had to be members for thirty days to be eligible to vote.[16] It was also agreed that because "[p]roblems regarding restraint of trade are a very real concern," there would not be "direct[ ]" discussion of these problems; instead, future discussions regarding ENMT were to be limited to the "safety aspects" of the issue. (J.A. 84; Tr. 687-88, 888-89).[17] For its part, Allied pledged to bring at least 100 people to vote against Article 331. (J.A. 86-87; Tr. 689; JX-1 ¶ 74).

The conspirators left nothing to chance. A formal "battle plan" was prepared, calling for, among other things, each participant to "go[ ] all out to have bodies on the floor to vote" at the May meeting and "to contact all steel companies . . . urging them to add new members and to be in Boston to vote." (J.A. 86, 87, 80; PX-167, PX-289, PX-168; Tr. 689-92; JX-1 ¶¶ 72-75). As the "battle plan" put it, "[t]he question to ask is: What is it worth to save our conduit business . . . ?" (J.A. 88).

Allied immediately took steps to get its "troops" in line. (Tr. 792, 1069-70). Commencing in February 1980, Allied's national sales manager began contacting the company's independent sales agents—separate companies unaffiliated with

15 PX-55 p. 1; J.A. 83; Tr. 684-85; JX-1 ¶¶ 33-38, 61-63.

16 JX-1 ¶¶ 64-65, 69-72; PX-127; Tr. 888, 1064-66.

17 Petitioner's statement that Carlon conceded that "the safety standard sought by Allied was supported by objective scientific evidence" (Pet. Br. 44) is misleading. It was stipulated in the district court that there are substantial bodies of opinion, including views held by those in both the plastic and steel industries, disagreeing on the relative safety of plastic and steel conduit. As the trial court instructed the jury, "[a]ll the jury should assume is that the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." (Tr. 2179).

Allied—as an additional source of new NFPA voters. (Tr. 779-82, PX-588, Rosen Tr. 4-6, JX-1 ¶ 65). Allied discussed with them the adverse economic effect that approval of Article 331 would have and assigned them targeted numbers of new members to recruit. (Tr. 775-82).

All told, the conspirators delivered at least 230 members to vote against Article 331 at the meeting. Among the 155 voters that Allied alone brought to the annual meeting were its employees, sales agents and their employees, company executives, employees of two of Allied's divisions—neither of which sold electrical products and one of whose businesses was "lawn furniture and things like that"—and the wife of the national sales director. (JX-1 ¶ 95; Tr. 795-97). For the express purpose of "gathering [their] votes," Allied paid all of these individuals' expenses, totaling over $100,000 for membership fees, travel expenses and other costs. (J.A. 91; Tr. 702-03, 783-84, 1070-72; JX-1 ¶ 96; PX-572; PX-412).

b. The May 1980 Meeting—The Conspiracy Succeeds

Implementation of the conspiracy to exclude Carlon's product from the market went forward with a cocktail party in Boston on the night of May 18th. "All Allied salesmen, representatives and personnel" were informed that attendance was "imperative." (PX-28; Tr. 788-90). Allied's self-described "troops" were given "[c]omplete instructions" on what to do at the meeting, including where to sit, based on a detailed seating chart broken down by "groups"; "group leaders" responsible for "keep[ing] order among the troops" were appointed; the "troops" were told that "[o]nce the NEC ratification starts" they were "expected to stay nailed to [their] seats"; and box lunches were to be provided "in case the session carries over into the evening—*NO ONE* leaves . . . until after this evening session." (PX-30 pp. 2, 8; Tr. 791-99; JX-1 ¶¶ 98, 100). The "troops" were explicitly informed that "[y]our Group Leader *will instruct you* how the discussion is progressing and *how to vote*." (PX-30 p. 8 (emphasis added); Tr. 798-800). Representatives of a number of steel conduit manufacturers met "to reach

a consensus . . . as to the procedures that were going to be followed at the meeting"; and Allied distributed walkie-talkies to the other steel companies to assure that the "troops" voted as instructed.[18]

Faithful to their instructions, the Allied members—sitting in their predesignated "groups"—"stay[ed] nailed to their seats" during the annual meeting. (Tr. 1078; JX-1 ¶ 98). Paying "no attention" to the substance of the proceedings, the "troops" had no idea as to the merits of what was at issue. (Tr. 908-11, 1013; PX-255). Thus, even though ENMT's claimed safety risk was the purported reason for Allied's opposition, very few of its voters had any of the technical documentation necessary to follow the proceedings; *nor did a single one of them speak in opposition to Article 331 during the course of the meeting*. (Tr. 908-09, 1372-73; *compare* Tr. 1656 *with* Tr. 195-207, PX-215 pp. 43-62). As one stated when asked why, as he put it, he was "instructed to vote to return [Article 331] to committee," "I was just told to come to the meeting and be present when they voted . . . ." (Tr. 913-14).

Although Allied's voters paid no attention to the substance of the proceedings, they were careful to follow the conspirators' instructions communicated to them via their "group leaders" by walkie-talkies and "signals"—"thumbs up, yes, thumbs down, no." (Tr. 800-03, 1368-71; JX-1 ¶¶ 101-10). Two votes were taken on Allied's coconspirator's motion to return Article 331 to committee. (Tr. 195, 804-05). The first, a voice vote, was inconclusive. (Tr. 207, PX-215 p. 56). The second, a standing vote, was taken amidst "a lot of confusion and congestion." (Tr. 208-12, 804-06). When the dust settled, the Chair ruled that Article 331 had been defeated by only four votes—394 to 390. (Tr. 216; JX-1 ¶ 112). Despite requests by Carlon and others, no recount was permitted under NFPA's rules, since no one who voted against Article 331 was willing to request one. (Tr. 216-23; PX-215 pp. 57-62). Finally, "[t]o insure that there would not be [any] change" in the outcome,

18 Tr. 880-86, 1076-78; *see also* Tr. 1072-75, Rosen Tr. 53-54, PX-90 p. 1, PX-412, JX-1 ¶¶ 104-07.

Allied's "troops" were kept in their seats until 2 A.M. when the final vote on the complete Code was taken. (Tr. 1085-87, 1379-80). Absent the hundreds of "troops" enlisted by Allied and its coconspirators to do their bidding (Tr. 1088), Article 331 would have been overwhelmingly approved.

The patent subversion of NFPA's consensus standard making process was the subject of criticism during the meeting itself. (PX-215 pp. 53-57). Thereafter, there was a "negative reaction" to the conspirators' conduct, including editorials in trade magazines castigating the "mob rule" that had "abuse[d]" NFPA and turned its "code-making process . . . into a battleground for establishing commercial preference for competing product types." (Tr. 1517, PX-584, PX-585 p. 5). Allied, however, was unrepentant. The only "lesson" that its Director of Public Safety Issues drew from this hostile reaction was that the next time Allied sought to rig a vote, it should "not [be] so obvious." (Tr. 1510-11, PX-32).

Following the defeat of Article 331, Carlon (and the National Association of Home Builders) appealed on the ground that the vote was not based on the "merits," was "not representative of the membership of the association and cannot be construed as [a] consensus." (PX-568; Tr. 225-26, 231). The NFPA Board of Directors, eschewing any investigation of the substance of these allegations and viewing the scope of its review as limited to the question of whether the Association's rules had been followed, found that, while the rules had been "circumvent[ed]," they had not been violated, and denied the appeal, returning Article 331 to committee "for further study."[19]

4. The Sanders Committee Report

In the wake of the May 1980 meeting, the NFPA Board of Directors was "concerned . . . very much" about the "circumvent[ion]" of the Association's rules. (Tr. 994, 1006-07, 1033-37). As Jack Sanders, its Chairman, testified, the conspirators'

19 Tr. 228-36, 995-99, 1013-15, 1017-20, 1022-23; PX-319, JX-1 ¶ 114.

"battle plan" was inconsistent with the spirit and intent of NFPA's consensus standard making procedures. (Tr. 1008, JX-1 p. 4). For it was wholly contrary to the Association's goals "for a company that would like to keep a competitive product off the market to register as many of its employees as possible . . . so that they may vote against that competitive product." (Tr. 1032-33; *see* Tr. 270-74, JX-1 ¶ 140).

In order to "combat any potential" for repeating "that kind of activity," the NFPA Board appointed a committee headed by Mr. Sanders to review the "stacking" of the 1980 meeting and to take steps "to maintain the integrity of the [Association's] standards." (Tr. 994, 1033; JX-1 ¶¶ 141-44). After a "review in-depth [of] the entire procedural activities under which we develop our codes and standards," the committee recommended, and the Board adopted, new regulations. (Tr. 1004-05, 1010-11; FX-333, JX-1 ¶¶ 141-45). These included increasing to 180 days the minimum time that a person must be an NFPA member in order to vote at the annual meeting. (Tr. 1036-37). As Mr. Sanders testified, the specific purpose of this change was "to avoid block voting by special interest groups in the future." (Tr. 1010, 1036).[20]

5. The Conspiracy's Market Effect

The successful conspiracy to exclude Article 331 from the 1981 NEC had the direct effect of excluding Carlon's product from the marketplace. In addition to the exclusionary impact in those jurisdictions which adopted the NEC as their electrical code and thereby precluded the lawful use of Carlon's product altogether, competition was inhibited by the stigma—and Allied's marketing of that stigma—resulting directly from the

20 With the new rules in place, and without opposition by Allied, Article 331 was finally included in the 1984 NEC, but with the limitation that ENMT could be used only in structures up to three stories in height. (Tr. 268, 270, 1658; PX-595 pp. 201-03). At its May 1986 meeting, NFPA approved a new Article 331 deleting the three-story limitation from the 1987 NEC. Allied's appeals from that approval were denied, and the Code now includes Article 331 without material limitation on ENMT's use.

wrongful exclusion of ENMT from the NEC even in those jurisdictions where Carlon's innovative and less expensive product could be lawfully used, *i.e.*, jurisdictions which (1) had no electrical code; (2) had adopted the 1981 NEC, but modified it to permit ENMT's use; or (3) later adopted the 1984 NEC, which permitted the use of ENMT.

This stigmatization of ENMT was successful because of the reliance by private decision-makers on the NEC's reputation as a product of consensus standard making. Thus, it was stipulated that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval."[21] Similarly, many electrical inspectors, contractors and distributors will not use a product absent NEC approval and the UL label, and underwriters will refuse to insure structures that are not built in conformity with the NEC. (Tr. 145-46, 288-90, 296-97; JX-1 ¶ 32).[22] And Allied fully capitalized on Carlon's predicament, doing "everything it could to make sure that as many people as possible found out about the defeat of Article 331," including advertisements and distribution of documents to "people in the industry" informing them of the defeat. (Tr. 2979-89).

In short, ENMT's exclusion from the 1981 NEC—the "primary code for the electrical industry in the United States"—effectively excluded the product from the marketplace. (JX-1 ¶¶ 25, 29; *see* Tr. 292, 300, 2589-90). This adverse market impact flowed directly from the conspiracy which subverted the consensus standard making process and from the public's reliance on the NEC as the purported product of unbiased industry consensus. (*See* Tr. 314, 532-33). The 1981 NEC gives no hint that it was the product of subversion or that it was adopted on any grounds other than the merits (PX-581); and,

21 JX-1 ¶ 31; *see* JX-1 ¶ 30; Tr. 290-91, 300, 556-57; PX-138 p. 2; DX-WS p. 3.

22 Petitioner's suggestion (Pet. Br. 40) that the conspiracy's direct market effect was an afterthought introduced only in the damages phase of the trial is incorrect. The stipulation cited in the text was introduced into evidence as a joint exhibit during the liability phase.

needless to say, neither Allied nor its coconspirators informed the public that the Code resulted from a stacked meeting at which the process had been subverted. To the contrary, as noted above, Allied fully exploited the stigma that its own conduct brought about throughout the marketplace.

B. The Proceedings Below

1. The Trial

After extensive pretrial proceedings, a bifurcated jury trial commenced on March 4, 1985 on Carlon's claim that Allied and its coconspirators had combined and conspired to "subvert NFPA's . . . consensual standards, rules and procedures" in order "to prevent competition from non-metallic tubing by excluding it from the 1981 NEC." (J.A. 10, 8). After four days of deliberation on the liability issues, the jury, in response to special questions, rendered its verdict, finding, *inter alia*, that "Allied's conduct in opposing Article 331 adversely impact[ed] competition," "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws," and was "a substantial or material factor in excluding Article 331 from the 1981 NEC."[23] Among its other findings, the jury concluded that "[r]egardless of whether Allied's conduct violated any of the rules or regulations of the NFPA"—which the jury found it did not (J.A. 24)—"Allied's conduct subvert[ed] the consensus standard making process of the NFPA"[24] and did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace."[25]

At the conclusion of the damages phase of the trial, the court instructed the jury that any award of damages must be limited to those incurred by Carlon as a result of the actions of Allied and its coconspirators "at the May 1980 meeting and [their] marketing of that defeat [of Article 331] in the marketplace."[26] The court went on to instruct the jury that Carlon did not claim, and the jury could not award, damages premised on any lobbying activities on Allied's part. (Tr. 3266). Based upon these instructions, the jury found that "as a proximate result of

---

23 J.A. 24-25. Under the district court's Rule-of-Reason charge, the jury was instructed to consider whether the NFPA's rules were "reasonably designed to secure a consensus with respect to safety of products as they were accepted or not accepted in the electrical code" and whether "the procedures that were followed at the floor meeting in May of 1980 [were] consistent with the spirit . . . of the rules of the NFPA." (Tr. 2250-51). In finding that Allied's conduct unreasonably restrained trade (J.A. 25) under that charge (the correctness of which is not challenged in this Court), the jury implicitly answered these questions in the negative—findings buttressed by the specific determination that Allied's conduct "subvert[ed] the consensus standard making process of the NFPA." (J.A. 24).

24 *Id.* While petitioner now asserts that the jury did not understand the subversion question and that the question was too vague for the jury to answer (Pet. Br. 27), Allied did not challenge at trial or in its post-trial motion in the district court the wording of any of the questions or of the court's charge relating to subversion. Indeed, the parties agreed upon the wording of the questions put to the jury.

25 J.A. 25. The jury also found that the "vote of the membership at the [May 1980] annual meeting [did not] effectively determine whether Article 331 would be excluded from the NEC," that "the NFPA rules and regulations [were] fair in that they provided a full and effective appeal from the vote of the membership," that "Allied's conduct [did not] deprive Carlon of full and effective access to the NFPA," that "Allied ha[d] a genuine belief as of May 1980 that . . . [ENMT] was unsafe," and that "[i]n opposing Article 331 in May, 1980, . . . Allied act[ed], at least in part," on that belief. (J.A. 23-25).

26 Tr. 3266. The district court charged the jury that:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered are as a direct result[] of what happened in 1980, and that is the plaintiff's claim. *The plaintiff claims [its] damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.* (J.A. 30) (emphasis added).

Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits. (Tr. 3288, J.A. 25).

In light of, *inter alia*, the district court's charge, Carlon's and Allied's counsels' opening and closing arguments at the damages trial, and Allied's stipulation of facts as incorporated in the final pre-trial order,[27] it is remarkable that Allied claims that "[t]he injury to Carlon, if any, was caused by the adoption of the NEC by various state legislatures . . ."; and that "[i]f Allied's lobbying efforts had been unsuccessful in obtaining state legislation, there would have been no harm to Carlon." (Pet. Br. 40-41). If, as Allied argues, Carlon was injured exclusively by legislative enactment of the NEC, *i.e.*, only in those jurisdictions that adopted the NEC, there would have been no need for Allied to have "marketed" the defeat of Article 331; for exclusion from the NEC would *ipso facto* have resulted in exclusion of Carlon's product from the market *in those jurisdictions*. Allied's "marketing" efforts were the coup de grace in the *other* jurisdictions which did not enact the Code.

2. The District Court's Oral Decision

In an oral bench decision, the district court held that the *Noerr* doctrine "require[d]" that the jury's verdict be set aside. (App. 25a). The underlying rationale of the court's ruling is not entirely clear. On the one hand, the court suggested that NFPA functions as a quasi-legislature and that, as a result, Allied's conduct in causing the Association to keep Article 331 out of the NEC constituted petitioning for legislation. (*See, e.g.*, App. 25a-26a).[28] On the other hand, the court also expressed the view that once the NEC is adopted by NFPA it "will almost inescapably be followed by the legislatures of the

27 J.A. 30-31; Tr. 3220-21, 3247-50, 2311-20, 3195; *see* pp. 10-12, *supra*.

28 *See also* Hearing Transcript, June 27, 1986, at p. 69.

various states" and, as a result, the entire NFPA standard setting process—including the complained-of concerted conduct—was no more than an attempt by Allied and its coconspirators to persuade state legislatures to adopt their anti-ENMT position. (App. 25a-26a).

3. The Court of Appeals' Decision

On April 22, 1987, the Court of Appeals for the Second Circuit (in an opinion by Senior Circuit Judge Lumbard, joined by Circuit Judges Kearse and Pratt) unanimously reversed, rejecting both of Allied's arguments for antitrust exemption.

At the outset, "declin[ing] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA," the court recognized that none of the concerns upon which *Noerr*'s holding was based applied to private organizations. (App. 12a). Unlike a government, a private organization is unelected, unaccountable and " 'presumed to be acting primarily on . . . its own behalf.' " (App. 13a-14a, quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985)). Thus, "[n]o . . . safeguards [similar to those applicable to governments] exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade." (App. 14a). Echoing this Court's decision in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570 (1982), the court of appeals emphasized that the concern that private standard setting organizations "might operate contrary to the public interest becomes particularly acute in view of their importance within the economy." (App. 15a). The court agreed with the Fifth Circuit's analysis in *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), and concluded that the fact that state and local governments may—but are not required to—adopt the NEC "does not transform the NFPA into a governmental organ." (App. 16a).

Turning to Allied's second argument—that its subversion of the standard making process was protected as an "indirect petition"—the court held that "Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a).[29] Again agreeing with the view of the Fifth Circuit,[30] the court differentiated between the "submission of a group's recommendations to the government"—which *is* protected—and "the antecedent conduct which generated those recommendations"—which is *not* protected. (App. 17a). Nor was the court "swayed by Allied's contention that . . . the only effective method of influencing . . . governments is through the NEC amendment process." (App. 18a). As Allied conceded, it had the opportunity to lobby the governments and, indeed, "over half the states and cities [that Allied] polled either amended the NEC before adopting it or refused to adopt it at all." (App. 18a-19a). The court of appeals likewise rejected Allied's argument that denial of antitrust immunity "would be inconsistent" with this Court's ruling in *Noerr* since, unlike the railroads' publicity campaign in that case, Allied's subversion did not "constitute[ ] 'political activity' conducted within the 'political arena.' " (App. 19a). "Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA." (App. 17a).

---

29 The court expressly noted that the district court had instructed the jury to allow damages only on the basis of direct injury flowing from Allied's conduct and not for "any injury arising from the adoption of the NEC by the various governments" (App. 9a n.3); and that Allied had challenged neither the correctness of, nor the foundation for, the jury's computation of the damage directly resulting from the stigma of exclusion from the NEC. (*Id.*) Significantly, Allied did not move for a directed verdict at the close of the damages phase of the trial, implicitly conceding the sufficiency of the evidence on the issue.

30 *See* Feminist Women's Health Center, Inc. v. Mohammad, *supra*, 586 F.2d at 545; United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985).

The court of appeals also rejected Allied's further contention that, even if not immunized by *Noerr*, its conduct did not constitute an unreasonable restraint of trade. (App. 19a-22a). The court "refuse[d] to permit [Allied] to use its literal compliance with [NFPA's] rules as a shield to protect [its conspiracy] from antitrust liability." (App. 21a). Nor did it find any merit in Allied's reliance on the existence of objective scientific evidence to support the exclusion of Carlon's product from the NEC since the " 'objective validity' of a restraint has never been a defense to an antitrust charge." (App. 22a).

Following the panel's decision, Allied petitioned the Second Circuit for rehearing and rehearing *en banc*, arguing specifically that the court of appeals had misconceived the trial record in concluding that Carlon's damage award was based on injury stemming from the direct marketplace effect of Allied's conduct. (*See* Petition for Rehearing at 7-13). On June 11, 1987, that petition was denied, no judge who heard the appeal and no active judge of the court "ha[ving] requested that a vote be taken thereon."

SUMMARY OF ARGUMENT

The court of appeals held that Allied's admitted conspiracy to exclude Carlon's product from the market by denying it inclusion in the National Electrical Code—a conspiracy found by the jury to constitute an unreasonable restraint of trade under the Rule of Reason—was not immunized from antitrust scrutiny by the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). That holding confined the *Noerr* doctrine to that category of cases involving "mere attempts to influence the passage or enforcement of laws" (365 U.S. at 135) and properly declined to extend it to the concerted conduct involved in this case: an agreement to subvert the standard making process by rigging the vote at a trade association meeting for the purpose of excluding a competitive product from a widely accepted industry code. Even though the code produced by those processes

was eventually adopted by some organs of state and local government, that circumstance did not bring Allied's conduct within the category of governmental petitioning with which the *Noerr* doctrine is concerned.

I. The Second Circuit's decision correctly distinguished between traditional restraints of trade governed by the Sherman Act and petitions by private parties seeking governmental action which itself may restrain trade. Antitrust principles have long been applied to regulate the opportunities for anticompetitive abuse inherent in standard making trade associations whose membership, like that of NFPA, includes commercial interests. Allied's conspiracy to exclude a competitive product from the market by polluting a widely-accepted industry code thus falls well within the antitrust mainstream.

By the same token, Allied's conspiracy was not a political effort designed to persuade state governments to act in a manner favorable to Allied and its steel conduit manufacturing cohorts. NFPA is not an organ of government, nor has it been delegated any governmental authority. What is more, Allied's conduct in conspiratorially stacking the vote at a standard setting meeting is the antithesis of the type of political lobbying which implicates the *Noerr* doctrine. Rather than rely on open debate in an effort to persuade, Allied and its coconspirators subverted the process by rigging the vote to produce a preordained result. The conspiracy, by stigmatizing Carlon's product, had a direct anticompetitive impact on the marketplace separate and apart from any effect flowing from ultimate adoption of the Code by organs of state and local government. That direct effect renders the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), inapposite and underscores the concomitant inapplicability of *Noerr*.

Petitioner's invocation of First Amendment rights of free speech, association and petition is inappropriate when viewed in the context of its admitted conduct—pollution of an industry code by voters whose presence was paid for and who did as they were told with no participation in any debate. And

Allied's suggestion that application of the Sherman Act to its conspiracy will somehow injure the code-making process is equally without foundation. Rather, it is the application of *Noerr* to shelter Allied's conduct from antitrust scrutiny that would cast a pall over all consensus standard making. When open discussion is eschewed in favor of vote rigging, no one—neither private citizens nor governmental organs—can safely rely on privately promulgated standards, and the public safety invariably suffers as a result.

Finally, even if Allied's conduct were somehow viewed as part of the petitioning process, it plainly was a sham. The conspiracy to subvert the National Electrical Code effectively diluted Carlon's vote within the Association and abused the process which Allied claims led to acts of government. As such, as the Ninth Circuit concluded in *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 827 F.2d 458 (1987), Allied forfeited any *Noerr* protection.

II. Once the claim of *Noerr* immunity is rejected, the jury's finding that Allied's admitted conspiracy to exclude competition unreasonably restrained trade is unassailable. Allied did not challenge the trial court's Rule-of-Reason instructions, and the evidence was more than sufficient to support the jury's verdict.

ARGUMENT

I.

THE *NOERR* DOCTRINE DOES NOT IMMUNIZE ALLIED'S ANTICOMPETITIVE CONSPIRACY FROM ANTITRUST SCRUTINY

In *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570-71 (1982), the Court emphasized that private standard setting organizations "wield[ ] great power in the Nation's economy" and are "rife with opportunities for anticompetitive activity," which can have a widespread impact given the pervasive influence that voluntary codes have on governments and private parties alike. This case presents a paradigmatic instance of how such opportunities can be seized to destroy the marketplace's competitive fabric and injure those seeking the chance, guaranteed by the Sherman Act, to compete on the merits of price, quality and service free from unreasonable restraint.

Petitioner's effort to cloak its conspiracy in the *Noerr* doctrine boils down to the assertion that Congress, although it enacted the Sherman Act as "the Magna Carta of . . . our free-enterprise system,"[31] intended to remove from all antitrust scrutiny the concerted and calculated subversion of private standard-making procedures for the purpose of excluding a competitor's product from the market—solely because some organs of state and local government ultimately decide to adopt the Code resulting from that subversion. Nothing this Court said, much less held, in *Noerr* even remotely supports that remarkable proposition.

For the *Noerr* doctrine applies only to those "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138. And Allied's admitted conspiracy to exclude Carlon's product from the market involved neither lobbying nor politi-

31 United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

cal activity. The Second Circuit was thus eminently correct in concluding that "Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr* . . . ." (App. 17a).

A. Allied's Vote-Stacking Conspiracy Was Not Mere Solicitation of Governmental Action

The linchpin of petitioner's argument is its proclamation—repeated time and again throughout its brief—that the conduct for which it has been found liable was nothing more than "lobbying directed at quasi-legislative code-making bodies" "where the ultimate goal is to influence state legislatures that will rely upon the final code." (Pet. Br. 17, 21). To characterize Allied's conspiracy in such a manner not only distorts the record,[32] but utterly mischaracterizes the essential teaching of *Noerr* and its progeny. What this record amply reveals is a blatant conspiracy in unreasonable restraint of trade which was designed to, and actually did, produce a polluted industry code that improperly excluded a competitive product from the marketplace. The fact that the code was, in one form or another, eventually adopted by some organs of government in no way transforms that restraint of trade into the type of political petitioning with which the *Noerr* doctrine is concerned.

1. The *Noerr* Doctrine

In *Noerr*, this Court upheld the defendant railroads' effort, through a concerted publicity campaign, to influence state government decision-making with respect to proposed legislation. The Court concluded that those petitioning efforts did not run afoul of the antitrust laws because Congress did not intend the Sherman Act to prohibit "mere solicitation of

32 As we demonstrate, *infra*, NFPA is not a "quasi-legislative body," since it has never been delegated to perform governmental functions by any organ of government and, in fact, eschews such a governmental role; and the conspiracy was designed to have, and actually had, a significant direct impact on the marketplace regardless of the actions of any state legislature.

governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138.[33] As Justice Black explained, the Sherman Act "does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136.

The Court's conclusion that Congress did not intend the Sherman Act to reach such conduct derived from two complementary propositions: (a) There is an "essential dissimilarity" between "an agreement jointly to seek legislation or law enforcement and agreements traditionally condemned by § 1 of the Act" (*id.*); and (b) applying the Sherman Act to concerted petitioning of the government "would raise important constitutional questions" since "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms" (*id.* at 138).

In light of these principles, it did not matter that the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors . . . ." *Id.* Given the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws" (*id.* at 139), the Court refused to condemn the railroads' conduct: "[A]t least insofar as [it] was directed toward obtaining government action, its

33 Petitioner takes issue with the court of appeals' characterization of *Noerr*'s rule as one of antitrust "exemption" to be construed narrowly. (Pet. Br. 17). But such semantic quibbling takes Allied nowhere. As the Court explained in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978), the doctrine is one of "implied exclusion[] from coverage of the antitrust laws" and is subject to a "presumption against repeal by implication." Indeed, as Justice Brennan went on to note, the doctrine has been "unavailing to prevent antitrust enforcement which, though implicating [the] fundamental policies [underlying the doctrine] was not thought severely to impinge upon them." *Id.* at 400. Here, as we explain *infra*, the policies underlying the *Noerr* doctrine are not implicated because Allied's conspiracy in unreasonable restraint of trade did not constitute petitioning for governmental action.

legality was not at all affected by any anticompetitive purpose it may have had." *Id.* at 139-40.

The *Noerr* doctrine[34] accordingly shelters anticompetitive private conduct only when that conduct does not itself partake of a traditional restraint of trade but, instead, seeks to induce the government to take action which restrains. Here, Allied's conspiracy was a traditional restraint of trade, not mere solicitation of a restraint to be imposed by organs of government.

2. The Conspiracy Was a Traditional Restraint of Trade

The contrast between Allied's conspiracy to exclude Carlon's product from the market and the publicity campaign immunized from antitrust in *Noerr* could not be more striking. The conspiracy in this case falls squarely within antitrust's mainstream. It was, in *Noerr*'s words, "characterized by an express . . . agreement . . . that the participants will jointly . . . help one another to take away the trade freedom of others . . . ." 365 U.S. at 136.

Antitrust, from its very beginnings, has had a strong antipathy toward private combinations that act "in reality [as] an extragovernmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465 (1941). "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Associated Press* v. *United States*, 326 U.S. 1, 15 (1945).

In accordance with these settled principles, the antitrust laws have long been applied to horizontal combinations which have the purpose or effect of excluding competing goods or services

34 In United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965), and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the doctrine was held to apply to petitioning of the executive, administrative and judicial branches of government as well as the legislature.

from the marketplace. Trade associations engaged in standard making, which has an obvious potential for anticompetitive abuse, are a prime example of such combinations. In *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 566 (1982), for example, the Court affirmed a Sherman Act judgment against a standard setting association based on its agents' manipulative interpretation of an existing industry code. *A fortiori*, concerted conduct which subverts the standard making process so as to produce an exclusionary industry code in the first place runs afoul of antitrust. To paraphrase *Hydrolevel*, "[Allied] successfully used its position within [NFPA] in an effort to thwart [Carlon's] competitive challenge." 456 U.S. at 562.

Over decades of Sherman Act litigation, the courts have routinely subjected agreements concerning the setting and implementation of standards to traditional antitrust analysis with no hint of *Noerr* immunity. Indeed, petitioner itself recognizes as much when it correctly states (Pet. Br. 42-43) that "[s]ince *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the rule of reason to Sherman Act claims arising out of certification, standardization and self-regulation programs of trade associations that do not involve boycotting, price fixing, or market division."[35]

35 *See* ECOS Elec. Corp. v. Underwriters Laboratories, 743 F.2d 498, 502-03 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981); Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 1980-2 Trade Cas. (CCH) ¶ 63,530, at 76,843 (10th Cir. 1980), *aff'g* 480 F. Supp. 640, 648-56 (D. Kan. 1979); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 158 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166, 169-70 (E.D. Tenn. 1962), *aff'd without opinion*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

Where standard setting has involved price fixing agreements or horizontal boycotts, the *per se* rule has been applied. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 41-42, 49 (1912); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 180-81, 198-200 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426 (7th Cir. 1965); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493-97 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); Bond Crown & Cork Co. v. FTC, 176 F.2d 974, 979-81 (4th Cir. 1949); Fort Howard Paper Co. v. FTC, 156 F.2d 899, 901-03, 905 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946); Milk & Ice Cream Can Inst. v. FTC, 152 F.2d 478, 480-83 (7th Cir. 1946); United States v. National Malleable & Steel Castings Co., 1957 Trade Cas. (CCH) ¶ 68,890, at 73,588, 73,595, 73,600-01 (N.D. Ohio 1957), *aff'd*, 358 U.S. 38 (1958).

In short, Allied's conspiratorial conduct falls well within the category of traditional restraints of trade with which the Sherman Act is vitally concerned. By the same token, the conspiracy was *not* political activity which merely petitioned the government to restrain.

3. The Conspiracy Did Not Constitute Petitioning of Government

Allied's conspiracy to subvert NFPA's consensus standard making process and exclude Carlon's product from the market was manifestly not a mere political effort to lobby and persuade state governments to take action favorable to Allied and the other coconspirator steel companies. *Noerr* draws a sharp distinction between the "proscriptions of the [Sherman] Act, tailored as they are for the business world," and the rules properly applicable to "the political arena." 365 U.S. at 141. Allied's conspiracy to corrupt NFPA's code-making processes did not take place in the political arena; nor did it involve political conduct. Petitioner is wide of the mark when it describes its conduct as "lobbying an agency like the NFPA." (Pet. Br. 27). NFPA is not an agency of government; and what Allied and its coconspirators did was not lobbying.

a. NFPA Is Not an Organ of Government

The court of appeals' refusal to extend *Noerr* immunity to "lobbying" activities directed towards so-called "quasi-legislative" bodies properly confined the doctrine's limited applicability to true governmental petitioning. (*See* App. 12a). NFPA, while possessing very substantial power to affect the economic well-being of companies attempting to market products covered by its codes, is a private organization and not an organ of any government.[36]

A private association of competitors taking commercially motivated action with no delegation of any legislative, executive or judicial authority of any kind from any federal, state or municipal government is not clothed with governmental status for *Noerr* purposes simply because organs of government later elect to adopt its code in whole or in part. And for good reason. "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985).

As the court of appeals acutely observed, bestowing upon private bodies like NFPA governmental status for purposes of *Noerr* immunity would run a grave risk that they will act contrary to the public interest[37]—a risk which the record in this case graphically reveals is very real indeed. That is why concerted efforts to persuade private groups to take anticom-

36 As the court of appeals noted, "Allied has made no claim of any official delegation of governmental power to the NFPA." (App. 12a-13a n.4). And NFPA itself has eschewed any governmental role by stating that it "is *not* an administrative arm of any state or local jurisdiction . . . ." (Decision of NFPA Board of Directors on Appeal of Allied Tube and Conduit Corp., Sept. 26, 1986, at 8) (emphasis in original).

37 "A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the general public." (App. 14a).

petitive actions do not constitute the type of political petitioning shielded by the *Noerr* doctrine.[38]

Thus, even if Allied, as it claims (Pet. Br. 24-25), was "attempting to influence a private group whose decisions would . . . have direct . . . influence upon state and local governments," the private nature of NFPA renders efforts to "lobby" before it is ineligible for *Noerr* immunity.

b. Allied's Conduct Was Not Lobbying

Nor was the admitted conspiracy to subvert NFPA's code-making processes effectuated by anything resembling political lobbying in the sense of attempts by constituents to persuade representatives to take desired governmental action. Rather, Allied's conspiracy was designed to "fix" the vote—the antithesis of genuine lobbying in which one seeks to influence the government through persuasion and debate. For petitioner to invoke notions of free speech and open debate is the epitome of irony in light of the undisputed fact that not one of its "troops" spoke at the meeting. As the court of appeals pointedly observed, "[f]ew of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting." (App. 8a).

Allied cannot properly characterize its conduct as "getting out the vote" (Pet. Br. 13). What it did was to "create" the vote in the crassest way by intentionally enrolling new NFPA members whose sole task was to attend a meeting, remain glued to their seats until called upon to act and, when instructed to do so by their leaders, cast an uninformed ballot for the "candidate" of Allied's choice. For petitioner to suggest (Pet. Br. 24-25) that this conduct was no more than

38 *See, e.g.*, Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (communications within hospital staff as a matter of law unprotected by *Noerr*); United States v. Johns-Manville Corp., 259 F. Supp. 440, 452-54 (E.D. Pa. 1966) (communications before private standard setting association not *Noerr*-protected).

"political advocacy" is to disregard the reality of what happened. Allied's vote-packing conspiracy "influenced" no one other than the purchased voters the conspirators brought to the meeting. If all that Allied did was to urge NFPA's members to reject Carlon's products because of the safety issue, the jury could not have found that NFPA's processes were subverted, and there would have been no unreasonable restraint of trade.

As for Allied's claims that "the effective route to Allied's goal was via the NFPA," that "[e]fforts directly to lobby local governments . . . would be largely futile," and that "parties seeking to be heard with respect to the NEC must join the political process at the NFPA" (Pet. Br. 25), they are refuted by the record. There is ample opportunity to lobby at the legislative level, as both the district court and the court of appeals expressly noted. In the Second Circuit's words:

> Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ." (App. 18a-19a).

And the evidence showed that Allied in fact availed itself of that opportunity. (Tr. 1499-1503).

Petitioner argues that its corruption of the standard making process is irrelevant to the *Noerr* calculus because the applicability of the doctrine does not turn on whether dishonest or unethical tactics were used in an effort to lobby organs of government. This misses the point. The publicity campaign in *Noerr*, whatever methods may have been used to implement it, was part of an overall program directed at persuading state governments to enact legislation favorable to the railroads. Here, in stark contrast, Allied organized a private conspiracy outside the political arena directed at an admittedly private body which was barred by law from lobbying activities. Far from trying to persuade anyone, the conspirators stacked the

deck in order to forestall any debate on the merits and thwart the result that would have followed a legitimate vote. Thus, unlike *Noerr*, where the defendants combined solely for the purpose of mounting a campaign directed at the body politic, here competitors misused a trade association already organized and existing for non-political purposes and rigged the association's code which, although held out to the world as the product of an unbiased consensus, was, in fact, anything but. *Cf. American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982).

c. The Conspiracy Caused Independent Marketplace Injury

The *Noerr* doctrine is grounded on the premise that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. It follows that a restraint which results directly from private, not governmental, action, is not within *Noerr*'s protection and, if unreasonable, violates the law. When private parties do no more than petition the government to take action which restrains, they are protected by the doctrine; but when they combine to restrain trade themselves, they are not. Put another way, private restraints of trade which a governmental entity may later decide in its discretion to adopt in whole or in part are not sheltered by *Noerr*. And that is precisely the case here. Painfully aware of the critical nature of the point, petitioner asserts that the "actions of Allied in the NFPA did not in themselves have any anticompetitive effect." (Pet. Br. 40). But that assertion is demonstrably incorrect.

Wholly apart from the restraint resulting from the adoption of the NEC by some state and local governments, the exclusion of Carlon's product from the NEC directly restrained trade and injured Carlon by stigmatizing the product throughout the marketplace. This restraint occurred in jurisdictions in which the code was not adopted at all and in jurisdictions where it was adopted with Article 331 included, either by modification

of the NEC before 1984 or as part of the NEC after 1984. The evidence supporting that fact, which was introduced in the "liability" phase of the trial,[39] was more than sufficient to justify the jury's finding that Allied's conspiracy unreasonably restrained trade[40]—as the court of appeals found on two occasions: once in its opinion on the merits and again in denying Allied's petition for rehearing, which focused specifically on this very issue.

The jury found that Carlon's injury flowed from that direct market restraint. The district judge's instruction on the issue could not have been clearer:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted

39 Allied is therefore incorrect when it states that the direct market impact of the conspiracy was an afterthought introduced for the first time at the damages stage of the trial. (Pet. Br. 39-40).

40 The evidence included the parties' stipulation that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval" (JX-1 ¶ 31); evidence that many electrical inspectors, contractors and distributors will not use a product if it is not in the NEC or if it does not have an Underwriters Laboratory label (Tr. 145-46, 288-90, 296-97; JX-1 ¶ 32); and proof that underwriters will refuse to insure structures that are not built in conformity with the NEC (Tr. 296-97).

In addition to this evidence in the trial's liability phase, the evidence during the damages phase further proved that Allied marketed the defeat of Article 331 and ENMT's resultant exclusion from the 1981 NEC. (Tr. 2291, 2589-90, 2605-06, 2667-69, 2682, 2724-25, 2727-28; *see* Tr. 3220-21, 3247-50). Indeed, Allied's own witness testified that Allied "was doing everything it could to make sure that as many people as possible found out about the defeat of Article 331," that it took out advertisements and distributed documents to "people in the industry" informing them of the defeat, and that in all of these efforts it never once informed the recipients that the defeat was the result of subversion of the standard-making process. (Tr. 2979-89). While Allied now characterizes this evidence as "trivial" (Pet. Br. 42), it was plainly sufficient to support the jury's findings, which petitioner implicitly conceded when it failed to challenge the damage verdict.

> to market that stigma in the years which have ensued . . . . The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct at the May 1980 meeting and its marketing of that defeat in the marketplace. (J.A. 30-31).[41]

In light of the trial court's instructions and the jury's damage finding, the court of appeals was plainly correct in concluding that "Allied's behavior . . . itself caused independent antitrust injury to Carlon . . . ." (App. 17a). That fact of the conspiracy's direct impact disposes of petitioner's argument that the only restraint injuring Carlon was the product of state action protected by the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its concomitant assertion—equally unfounded—that the anticompetitive conduct which brought about Carlon's injury was no more than petitioning for such state action.[42]

Nor is there any substance to petitioner's reliance on *Hoover* v. *Ronwin*, 466 U.S. 558 (1984). Contrary to Allied's contention, that decision does not extend *Parker* protection to conduct of private parties such as NFPA (much less Allied and its steel conduit coconspirators) merely because the state later chooses to adopt as its own what they have done. *Hoover* holds no more than that there can be no antitrust liability when the sovereign act of the state *alone* restrains trade, even if such state action may have been the product of the concerted

41 The trial court went on to make clear that lobbying activities could not form the predicate of any damage award: "To the extent that the defendant has sought to bring to the public's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political bodies with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages because that type of conduct would be protected and is not a violation of the antitrust laws." (J.A. 31).

42 As the court of appeals noted, citing *Parker*, Carlon did not seek, and the jury did not award, any redress for injury resulting from adoption of the NEC by governmental units. (App. 9a n.3).

conduct of private parties delegated by the state to perform advisory functions.[43]

In short, Allied's reliance on the doctrine of *Parker* v. *Brown*, like its reliance on *Noerr*, stands on the faulty premise that the conspiracy in this case did not directly impact the marketplace and Carlon. Since the jury, under proper instructions, found precisely the contrary, that is the end of the matter.[44]

43 The distinction between *Hoover* and this case is readily apparent. In *Hoover*, an alleged conspiracy among private parties delegated by the state to perform a governmental function ultimately produced a decision by the highest court of the state to deny the plaintiff admission to the bar—a restraint and an injury which only the state could effectuate. Here, in marked contrast, the jury found that a conspiracy among private persons not authorized by any organ of government to perform any governmental function caused a direct market restraint and direct injury to Carlon—effects which would have occurred *whether or not* any organ of government adopted the NEC.

44 In a last ditch argument Allied asserts that the injury caused by the conspiracy was "incidental" to otherwise lawful petitioning and thus not a bar to application of the *Noerr* doctrine. (Pet. Br. 41-42). The point takes Allied nowhere. To begin with, as explained *supra*, the conduct of Allied and its coconspirators was not petitioning of the government within the contemplation of the *Noerr* doctrine. Beyond that, the marketplace injury found by the jury was direct, not incidental. The only injury claimed by the plaintiff truckers in *Noerr* was concededly caused by the governor's veto of proposed legislation. 365 U.S. at 130. The Court's discussion of other possible incidental injury was, thus, unrelated to the claimed damages in that case. Here, on the other hand, the jury awarded damages based on Carlon's direct, reasonably foreseeable and significant marketplace injury in states which did not adopt the conspiratorially polluted NEC and on Allied's conduct in marketing the conspiratorial defeat of Carlon's product at the NFPA meeting. To say that such injury, intentionally inflicted with an admitted purpose to exclude Carlon's competition from the marketplace, was "at most an incidental accompaniment of the Allied campaign for legislative exclusion of ENMT" (Pet. Br. 42) flies in the face of reality.

B. Imposing Antitrust Liability for Allied's Concerted Subversion of the Consensus Standard Making Process Is Necessary to Preserve the Process's Social Utility and Will Not Stifle Uninhibited Debate

Allied would have the Court believe that applying the Sherman Act to its blatantly anticompetitive conduct would "undervalue[ ] the role of code-making bodies in the political process" and would have a "chilling effect . . . on code-making activities." (Pet. Br. 31). Far from undervaluing the importance of private code-making, the Second Circuit sought to protect that vital function from the abuse that this record reveals would be all too easy to accomplish in the absence of antitrust regulation.

Petitioner's essay on the unquestioned importance of trade associations in "creating, through internal bargaining and the winnowing of options, a consensus that can be presented to political decision makers" (Pet. Br. 32) has a hollow ring against the background of Allied's conduct here. Petitioner and its steel conduit coconspirators made a mockery of NFPA's consensus standard making procedures and thwarted the true consensus that NFPA would have reached but for Allied's vote packing. It is especially because so many people, including a number of governmental organs, rely on the standard making activities of associations such as NFPA, and because such associations render valuable civic services,[45] that the antitrust laws should be applied to protect the process from subversion.

45 The Ninth Circuit's statement to that effect in Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 463-64 (9th Cir. 1987), is correct; but as that court itself recognized in concluding that Allied's conduct here should not be protected by the *Noerr* doctrine because of the sham exception (*id.* at 465), the importance of that civic function requires that the process of consensus standard making be protected from the type of subversion revealed by this record—protection that can be provided only by application of the antitrust laws. Significantly, the trade association involved in *Sessions* limits its voting membership to public officials (*see id.* at 461), so that the type of vote-packing conspiracy involved in this case could not be effectuated there.

In the usual case of legislative petitioning—exemplified by *Noerr* itself—the legislature expects to receive partisan views from all areas of the citizenry and is in a position to assess their relative merits and reach a governmental decision. But partisanship is the antithesis of legitimate private standard making, since both government and private citizens alike expect privately promulgated codes to be the unbiased product of genuine consensus on the merits. The government's very need to rely on private parties to weigh the evidence and arrive at appropriate safety standards makes it critical for the process to be objective and for standards to be arrived at on the merits free from anticompetitive bias. When NFPA adopted the NEC without Article 331, the legislatures and organs of local government, accustomed to accepting such codes as the product of true consensus, were intentionally misled.[46] They did not receive the benefit of the "full and vigorous participation in the code-making process" that Allied proclaims is vital. (Pet. Br. 35).

As for petitioner's suggestion that application of the Sherman Act to its conduct would "stifle uninhibited debate" (Pet. Br. 31), it is pure fantasy. No one claims that Allied should have been restrained in any way from expressing its views, either within or outside NFPA. The fact is that Allied did not engage in any discussion or debate at the May 1980 meeting at which it fixed the vote. Debate was unnecessary because the outcome was preordained. The decision below in no way limits anyone's right to debate or express an opinion as to the safety or suitability of any product on any occasion. Allied's rhetoric cannot transform this vote-packing conspiracy—with its "battle plan" to enlist hundreds of know-nothing "bodies" and give

46 In a very real sense, what Allied and its coconspirators did was to perpetrate a fraud on the state and local governments they now say they were legitimately trying to influence. *Cf.* Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (1888) ("The gist of the action is fraudulently producing a false impression upon the mind of the other party"). For Allied to state that it "deceived no one" (Pet. Br. 14), "spoke the truth and misrepresented nothing" (Pet. Br. 46) is thus, to say the least, disingenuous.

them "instructions" on how to vote—into a "robust and wide-open debate" involving "advocacy." (Pet. Br. 34). In light of the fact that not a single one of Allied's executives or "troops" spoke at the May 1980 meeting in opposition to Article 331, it is fatuous to suggest that application of the Sherman Act to this conduct will inhibit debate by anyone. Allied's invocation of the "traditional democratic process" (Pet. Br. 35) reflects a unique view of America's heritage. Our Nation's democratic tradition calls for free and fair elections, not stuffing the ballot box.[47]

Finally, Allied half-heartedly suggests that its conduct might be protected by the First Amendment. (Pet. Br. 49-50). That notion has no substance whatsoever. Even if one were to view Allied's conspiracy as, to some extent, an association "for expressive purposes," applying the Sherman Act to it would cause only an "incidental abridgment" of First Amendment rights to expressive association "no greater than is necessary to accomplish the [Sherman Act's] legitimate purposes." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984). *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-15 (1972) ("It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute"), citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (state may constitutionally prohibit, under general prohibition of conspiracies in restraint of trade, a union's truthful and peaceful picketing).[48]

47 Allied has the temerity to suggest that its conduct was nothing more than traditional politics and that Carlon should have engaged in the same subversive tactics. (Pet. Br. 35). How the creation of uninformed and uninterested "voters" by both sides in a standards debate is supposed to produce an objective safety standard on which anyone may rely remains a mystery.

48 *See also* City of Los Angeles v. Preferred Commun., Inc., 476 U.S. 488, 106 S.Ct. 2034, 2038 (1986) ("where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests").

To confer *Noerr*'s antitrust immunity upon Allied's egregious subversion of consensus standard making would, as a practical matter, remove the Sherman Act's protection from all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government. Since there are thousands of privately issued standards covering a vast array of products,[49] many of which are adopted in whole or in part by governmental units, application of *Noerr* to legitimize Allied's conspiracy would enable members of private organizations that are "rife with opportunities for anticompetitive activity"[50] to seize such opportunities in order to injure their rivals and deprive the public of new, innovative and more economical products. That, of course, is precisely what happened in this case.

What is more, immunizing Allied's conduct would seriously undermine the credibility of standard making throughout the economy and thus deprive the public of its benefits. For the public could never know whether standards generated by trade associations are the product of a true consensus on the merits or whether, as here, they are simply the result of economically motivated private combinations of competitors who have subverted the process for their own anticompetitive ends.[51]

In the final analysis, Allied's invocation of the influential role played by standard making bodies in the economy as a justification for its subversion of the consensus standard making process is supremely ironic. The *Noerr* doctrine, narrowly crafted to preserve the right to petition the *government*, is not so perverse as to license private combinations to deprive the public of new products by subverting *private* industry codes. Nothing in the opinion below infringes Allied's, or anyone

49 *See* Pet. Br. 33: "More than 420 private organizations now participate in promulgating some 32,000 codes and standards." *See* American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., *supra*, 456 U.S. at 559.

50 American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., *supra*, 456 U.S. at 571.

51 *See generally*, brief *amicus* of New York and other states.

else's, right to debate a product's merits or petition the government to act on its behalf. The only conduct that the decision will "inhibit" is conspiracies in unreasonable restraint of trade which exclude rivals from the marketplace by subverting standard making procedures,[52] thus "impair[ing] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal costs of providing them." *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 2018 (1986).

C. If Otherwise within the *Noerr* doctrine, Allied's Conduct Falls Squarely within the Sham Exception

If, contrary to our submission, Allied's conspiracy to subvert NFPA's standard making process were deemed to constitute solicitation of governmental action within the meaning of *Noerr*, the shield of the doctrine would still not protect it because it would then fall squarely within *Noerr*'s sham exception.

The sham exception embraces the entire spectrum of improper activities which, in the guise of petitioning, abuse or corrupt governmental processes to further anticompetitive goals. *See, e.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Israel* v. *Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972).

That Allied abused NFPA's processes is beyond dispute. The jury specifically found that it subverted the Association's standard making process, a finding with overwhelming evidentiary support in the record. Allied's protestations that it "genuinely" sought to influence legislation cannot dispel the fact that its conspiracy deprived Carlon of a meaningful vote at the May

52 As the court of appeals noted, petitioner's "conduct 'subverted' the code making process which Allied admits contained an inherent 'potential for abuse.' " (App. 21a).

1980 NFPA meeting.[53] If NFPA's standard making procedures are to be viewed as part of the political process, then the deliberate dilution of the nonconspirators' votes by virtue of Allied's conspiratorial vote-packing plan constitutes an abuse of the worst kind. And that is precisely what the Ninth Circuit concluded in *Sessions Tank Liners, Inc.* v. *Joor Manufacturing, Inc.*, 827 F.2d 458, 465 (9th Cir. 1987). While taking what we submit is too broad a view of the *Noerr* doctrine, the Ninth Circuit nonetheless had no hesitation in concluding that Allied's conduct forfeited the doctrine's protection because it was a sham.[54]

Whatever the rubric, when all is said and done the result is the same and straightforward: The law does not provide a shield, in the guise of governmental "petitioning," for anticompetitive perversions of consensus standard making by competitors conspiring to exclude the products of their rivals from the marketplace. That was the essence of the court of appeals' decision below. It was eminently correct and should be affirmed.

---

53 *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

54 Significantly, the *amicus* brief on behalf of The Western Fire Chiefs Association (and three other associations), while styled in support of petitioner, in fact does not argue for application of *Noerr* immunity on the facts of this case. Rather, those *amici* assert that the Court should adopt the view of the Ninth Circuit in *Sessions* and "regulate abuses of the [standard making] process through the sham exception." Brief of Western Firechiefs Association *et al.* as *amici curiae* at 4; *see also id.* at 19 ("Excepting 'inappropriate' or 'improper' lobbying activities from *Noerr-Pennington* protection by invoking the sham exception is an effective way of regulating subterfuge of the political process. The sham exception precludes the possibility that *any* activity, whether it is model code-making or otherwise, may be totally exempt from antitrust scrutiny").

II.

THERE BEING NO *NOERR* IMMUNITY, THE JURY'S FINDING THAT ALLIED'S VOTE-STACKING CONSPIRACY UNREASONABLY RESTRAINED TRADE IS AMPLY SUPPORTED BY THE EVIDENCE

The inapplicability of the *Noerr* doctrine to concerted subversion of an association's code-making process does not mean that the Sherman Act will invariably be applied to stifle that process and deprive the public of the very real benefits of consensus standard making. For the fact that standard making by a trade association may have an injurious effect on competition does not necessarily make the concerted conduct unlawful. It becomes unlawful only if found by the trier of fact to be unreasonable in all the circumstances.[55] The jury in this case properly applied the Rule of Reason in finding that the antitrust laws had been violated; and there is no legal infirmity in that finding.

Petitioner concedes that "[s]ince *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the Rule of Reason to Sherman Act claims arising out of certification, standardization, and self-regulation programs of trade associations that do not involve boycotting, price fixing or market division" (Pet. Br. 42-43). That concession provides the complete answer to Allied's argument that the jury's finding of an unreasonable restraint here is somehow legally erroneous. There is no dispute that the trial court correctly instructed the jury on the elements of the Rule of Reason; and, considering all of the evidence, the jury concluded that the conspiracy's anticompetitive effect in subverting the standard making process and directly restraining competition outweighed whatever procompetitive justifications there might ordinarily be for consensus standard making.

---

55 Neither the district court nor the court of appeals so much as suggested that a rule of *per se* illegality should be applicable here; and Carlon takes no such position in this Court.

Under the Rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). This factfinding process requires "a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anticompetitive effects outweigh its pro-competitive effects." *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 620 F.2d 930, 934 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). The only limitation is that the inquiry must be "confined to a consideration of [the restraint's] impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The district court put precisely that inquiry to the jury.[56] Weighing the procompetitive benefits usually ascribed to standard making—the dissemination of product information which is valuable only to the extent that it results from an untainted consensus—against the anticompetitive effect resulting from the fact that the Association's processes had been subverted, the jury found an unreasonable restraint of trade.[57]

It is no answer for Allied to argue that "Carlon's concession at trial that the safety standard sought by Allied was supported by objective scientific evidence" (Pet. Br. 44) somehow undermines the jury's Rule-of-Reason verdict. All that Carlon conceded was that there was objective evidence on *both* sides of

56 The district judge instructed the jury, *inter alia*, that "[y]ou have to decide whether or not the pro-competitive aspect of the defendant's conduct in this case and the standard making process, which was involved in this case, as such outweigh any anticompetitive aspect." (Tr. 2168).

57 The jury's subversion finding alone was sufficient to warrant a judgment under the Sherman Act for Carlon. For Allied's own expert witness testified that voting on a product standard without regard to the product's merits—which is exactly what Allied's "troops" were enlisted to do—would eliminate the procompetitive value usually associated with the standard making process. (Tr. 1571-73).

the dispute and that reasonable people could differ. The issue, in short, was debatable.[58] But, as a result of Allied's concerted conduct, fair and open debate was frustrated. To characterize Allied's acts as no more than the "dissemination" of truthful information (Pet. Br. 44) ignores what happened—a bald conspiracy to exclude replete with vote creation and ballot stuffing. It is small wonder that the jury characterized this as a subversion of the standard making process.

Nor does it advance petitioner's case to argue (Pet. Br. 46-49) that its compliance with NFPA's rules and the so-called "procedural fairness" of the proceedings negates the jury's restraint of trade determination. The presence or absence of "procedural safeguards" is an antitrust irrelevancy. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). It is settled law that a trade association's rules may themselves violate the Sherman Act;[59] and it follows that it is no defense to a Sherman Act charge that there was no violation of an association's rules. Indeed, if compliance with the association's rules were all that is required to avoid Sherman Act liability, there would be nothing to stop association members from enacting rules expressly permitting the very type of brazen anticompetitive behavior that occurred here.

As for "procedural fairness," it ill behooves Allied, whose conduct polluted the NFPA proceedings from top to bottom, to talk about the fairness of the association's procedures. Allied did substantially more than act "unethically in its

58 As a matter of law safety considerations cannot legitimize an otherwise unlawful conspiracy in unreasonable restraint of trade. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 693-96 (1978). In any event, the scientific view proffered by Carlon ultimately prevailed, and today Carlon's product is in the NEC with no meaningful restrictions.

59 *E.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 692-96; Associated Press v. United States, 326 U.S. 1, 14-19 (1945); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 47-49 (1912).

campaign to have the NFPA adopt a scientifically supportable safety standard." (Pet. Br. 47). It corrupted the association and produced a code which was demonstrably *not* the product of unbiased and objective consensus—all for the purpose and with the direct and foreseeable effect of excluding Carlon's product from the marketplace. Once pretensions of *Noerr* immunity are stripped aside, this conspiracy stands as a classic unreasonable restraint of trade. The jury so found, and its finding is fully supported by the evidence.

CONCLUSION

For all the reasons stated above, the judgment of the court of appeals should be affirmed in all respects.

Dated: December 31, 1987
New York, New York

Respectfully submitted,

FREDRIC W. YERMAN
(*Counsel of Record*)
425 Park Avenue
New York, New York 10022
(212) 836-8000
Attorney for Respondent

Of Counsel:

Michael Malina
Randolph S. Sherman
Richard A. De Sevo
Bert L. Slonim
Donna M. Gerber
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000